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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 99

THE E. KAHN'S SONS COMPANY, A CORPORATION,
PETITIONER

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals appears at pages 440 to 447 of the Record. The opinion of that court in *Armour and Company* v. *Bowles,* No. 101, referred to in the opinion in the present case, is reported at 148 F. (2d) 529, certiorari denied June 4, 1945, No. 1220, 1944 term.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered March 29, 1945

(R. 448). Petitioner's petition for rehearing and motion for vacation of judgment were denied on May 1, 1945 (R. 468). The petition for a writ of certiorari was filed May 29, 1945. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as amended, C. 26, 56 Stat. 23, 58 Stat. 643 (herein sometimes referred to as "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTIONS PRESENTED

(1) Whether petitioner established that the maximum prices for beef carcasses and wholesale cuts under Revised Maximum Price Regulation 169 fail to comply with the standards for maximum prices prescribed by the Emergency Price Control Act and the Stabilization Act of 1942.

(2) Whether the provisions of Section 2 (a) of the Emergency Price Control Act that maximum prices shall be "generally fair and equitable" and of Section 3 of the Stabilization Act of 1942 that they shall provide "a generally fair and equitable margin" for processing are satisfied, as applied to a multiple-product industry, if the industry's over-all earnings are in excess of those of a normal peacetime period, and if the industry obtains, with respect to the particular product or closely related group of products, the out-of-pocket costs involved in the production

of the product or group of products, exclusive of selling and general administration expenses.

(3) Whether it was arbitrary and unreasonable or otherwise not in accordance with law for the Price Administrator to refuse to accept the cut-out test method of determining beef costs as a measure of the adequacy of maximum prices for beef carcasses and wholesale cuts.

STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, and of the Stabilization Act of October 2, 1942, as amended (56 Stat. 765, 58 Stat. 643) are set forth in the Appendix, *infra,* pp. 11–18. Revised Maximum Price Regulation No. 169, Beef and Veal Carcasses and Wholesale Cuts, was issued December 10, 1942, effective December 16, 1942 (7 F. R. 10381). The present proceeding involves the general level of maximum prices established by the regulation for beef carcasses and wholesale cuts.

STATEMENT

Petitioner is a meat packer engaged, among other operations, in the slaughter of cattle and the sale of fresh beef carcasses and wholesale cuts (R. 4, 341). On April 1, 1943, petitioner filed a protest pursuant to section 203 (a) of the Act against the provisions of Revised Maximum Price Regulation No. 169—Beef and Veal Carcasses and Wholesale Cuts, issued December 10,

1942 (7 F. R. 10381). An opportunity to present additional evidence was furnished by an order of the Price Administrator issued on April 28, 1943 (R. 14). On July 21, 1943, petitioner filed a petition jointly with five other protestants requesting immediate decision of their protests (R. 17). By an order issued August 24, 1943 (R. 29), the Administrator consolidated those six protests with ten others, denied the petition for immediate decision and provided the protestants an opportunity to present evidence in rebuttal of that contained in and appended to the opinion accompanying the order (R. 32–79). That evidence included data as to the over-all profitability of the meat packing industry under the regulation, and data showing that the industry as a whole had historically incurred losses on fresh beef operations as measured by the so-called cut-out test method of establishing beef costs, upon which the protests were based. On September 2, 1943, petitioner filed, jointly with five other protestants (R. 20), a statement of views concerning the Administrator's order and opinion of August 24, 1943.

The Administrator on October 27, 1943 denied the consolidated protests to the extent that relief had not been granted by a Directive issued on October 26, 1943 by the Director of the Office of Economic Stabilization (8 F. R. 14641, R. 155) instituting a plan for the stabilization of cattle

prices and a differential subsidy for cattle slaughterers not engaged in any processing operations. The opinion accompanying the Administrator's order (R. 82–163) contained additional data on the profitability of the meat packing industry under the regulation and further evidence relating to the cut-out test method of determining beef costs. The order denying the protests authorized the protestants to request reopening and reconsideration. Within the time allowed for making such a request, petitioner filed its complaint in the Emergency Court of Appeals (R. 371) and, on January 25, 1944, requested leave of the court, pursuant to section 204 (a) of the Act, to submit additional evidence (R. 288).

The application was granted, and the Administrator on February 21, 1944, reopened the protest proceeding (R. 305) to receive the additional evidence filed by petitioner (R. 288–304), which incorporated by reference (R. 292) the extensive additional evidence submitted by five other protestants in the consolidated protest proceeding who had filed a joint complaint in the Emergency Court of Appeals. On April 24, 1944, the Administrator issued an order and opinion denying the six consolidated protests after consideration of the additional evidence presented (R. 327–370A). The two complaint proceedings were consolidated in the Emergency Court of Appeals (R. 441) and the Administrator filed on May 15, 1944, for both cases, a supplemental transcript of the

proceedings before him (R. 197). Some additional evidence was presented by the Administrator directly to the Court (R. 392). Judgment dismissing petitioner's complaint[1] was entered by the Court below on March 29, 1945 (R. 448). Petitioner's petition for rehearing (R. 449) was denied without opinion on May 1, 1945 (R. 468).

ARGUMENT

The petition for certiorari attacks the validity of Revised Maximum Price Regulation 169 on essentially the same grounds advanced in *Armour and Company* v. *Bowles,* No. 1220, 1944 Term, certiorari denied June 4, 1945. The cases were decided by the court below on the same day, and in the present case the court said (R. 441): "On the main point, the two consolidated cases now before us are governed by our decision in the *Armour* case." The present petition was filed prior to the denial of certiorari in the *Armour* case.

Certain additional contentions made by petitioner may be noted. With respect to the Ad-

[1] In the case with which petitioner's was consolidated, *Heinz et al.* v. *Bowles*, No. 102, decided March 29, 1945, the Emergency Court of Appeals set aside the regulation as applied to nonprocessing slaughterers on the ground that inadequate provision had been made for this special group in the industry. The judgment setting the regulation aside was vacated with consent of counsel for the purpose of receiving further evidence as to the actual operating experience of the nonprocessing slaughterers under the regulation and the special subsidy which they receive.

ministrator's rejection of the so-called cut-out test method of cost accounting, petitioner apparently argues that while the considerations leading to such rejection may be applicable to the very largest packers, they are not properly applicable to the numerous smaller packers of which petitioner claims to be representative. But there can be no dispute about the fact that petitioner does engage, to some degree at least, in the following operations, the returns from which are not reflected by the cut-out test, although they enhance the value of cattle: the manufacture of sausage; the fabrication of beef cuts for sale to purveyors of meals; grinding beef into hamburger; and curing and drying beef cuts (R. 4). The basic defects in the cut-out test therefore apply even in the case of the small packers.

Petitioners also argue that they proved that the small packers could not recover out-of-pocket costs on cattle operations. Under Section 204 (b) of the Act, the burden of establishing that a maximum price regulation is not in accordance with law, or is arbitrary or capricious, rests upon the complainant. *Montgomery Ward & Co.* v. *Bowles,* 138 F. (2d) 669 (E. C. A. 1943); *Cudahy Bros. Co.* v. *Bowles,* 142 F. (2d) 468 (E. C. A. 1944); *Gillespie-Rogers-Pyatt Co. Inc. et al.* v. *Bowles,* 144 F. (2d) 361 (E. C. A. 1944). In the present case petitioner's argument is wholly unsupported in the record by any actual operating results ad-

justed to reflect the additional returns allocable to beef from sausage manufacturing or whatever other processing operations are carried on by the small packers, although petitioner had been given ample opportunity in the protest proceeding to introduce such evidence (R. 305, 310–313). Moreover, petitioner's argument is based on the assumption that petitioner was representative of small packers generally in the extent of processing performed. This assumption was not accepted by the Administrator, as petitioner's brief might seem to suggest, but on the contrary was sharply contested.[2]

The court below held that (R. 441):

> On the main point, the two consolidated cases now before us are governed by our decision in the *Armour* case. In that case we upheld the Administrator's contention that the cut-out test method of cost accounting is not an acceptable criterion for determining whether RMPR 169 establishes generally fair and equitable maximum prices.

And further, that (R. 442):

> As the record stands, they [the present complainants] have failed to sustain the burden of proving their case under the *Gillespie* formula as applied by us in the *Armour* case.

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[2] See the Administrator's memorandum in opposition to the petition for rehearing below (R. 460, 463–466).

The issue here, however phrased by petitioner, is essentially one of factual determination, a task peculiarly within the competence of the Administrator, subject to judicial review by the Emergency Court of Appeals as to the reasonableness of his determination. Petitioner has fallen far short of showing any justification for further review of administrative findings of fact which have thus been sustained. *Commissioner* v. *Scottish American Co.*, 323 U. S. 119, 123; *Dobson* v. *Commissioner*, 320 U. S. 489.

It may not be inappropriate to note that petitioner made no showing that it was suffering hardship. On the contrary, the Administrator found that petitioner was earning substantial profits (R. 344, note 17), and that the earnings of small packers generally were in excess of those of peacetime years (R. 121, 126, 152, 370, 415). Moreover, the Administrator has recognized, and the court below held in the companion *Heinz* case (R. 443–444), that even where a regulation is generally fair and equitable, some provision must be made, consistently with effective administration of the stabilization program, to protect against loss

> a whole group of producers constituting an important segment of the industry who, because of the nature of their operations, have a common economic situation that sets them apart from the rest of the industry.

The decision below, therefore, cannot be construed as threatening the existence of any class in the industry such as the class of which petitioner contends it is a representative member.

CONCLUSION

The decision below is right and does not warrant review. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

RICHARD H. FIELD,
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JUNE 1945.